Rose Fence, Inc. *and* Local 553, International Brotherhood of Teamsters. Cases 29–CA–030485 and 29–CA–030537

October 22, 2012

DECISION AND ORDER

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On January 27, 2012, Administrative Law Judge Mindy E. Landow issued the attached decision. The Respondent filed exceptions and a supporting brief. The Acting General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Rose Fence, Inc., Baldwin, New York, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(c).

"(c) Make the unit employees described above whole for any loss of earnings and other benefits suffered as a result of Respondent's unilateral layoff of employees, in the manner set forth in the remedy section of the decision."

Brent Childerhose, Esq., for the Acting General Counsel.
Stanley Israel, Esq., of Bronx, New York, for the Respondent.
William K. Wolf, Esq. (Friedman & Wolf), of New York, New York, for the Charging Party.[1]

DECISION

STATEMENT OF THE CASE

MINDY E. LANDOW, Administrative Law Judge. Based upon charges filed on November 15 and December 13, 2010,[2] by Local 553, International Brotherhood of Teamsters (the Union), an order consolidating cases, consolidated complaint, and notice of hearing (the complaint) issued on February 28, 2011, alleging that Rose Fence, Inc. (the Employer or Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The complaint alleges, in essence, that Respondent violated the Act by: unilaterally announcing a new rule requiring employees to punch out at 4 p.m.; unilaterally reducing the work hours of employees; unilaterally laying off employees and unilaterally subcontracting bargaining unit work all without notice to and bargaining with the Union as the exclusive collective-bargaining representative of its employees in an appropriate unit. The complaint was subsequently amended during the course of the hearing in this matter. The complaint, as amended, adds the allegations that since August 3, Respondent has laid off employees and hired subcontractors without bargaining with the Union to a good-faith impasse or reaching agreement. Respondent filed an amended answer denying the material allegations of the complaint. A hearing in this matter was held before me in Brooklyn, New York, on July 20 and

[1] We agree with the judge, for the reasons she gave, that each of the Respondent's decisions to lay off an individual employee—made consecutively as work diminished—was a mandatory subject of bargaining. As the Respondent unilaterally made those individual decisions after its bargaining obligation arose, the layoffs violated Sec. 8(a)(5). Further, even if the Respondent decided, before its bargaining obligation arose, that it would later lay off employees as necessary, it was still required to bargain over the postobligation individual layoff decisions—including the number, timing, and terms of the layoffs—as effects of that earlier decision. See *Bridon Cordage, Inc.*, 329 NLRB 258, 258–259 (1999) (although employer made a decision to reduce inventory before bargaining obligation arose, postobligation layoff that was the effect of that decision was a mandatory subject of bargaining). Because the Respondent did not make the arguments advanced below by Member Hayes (as he properly acknowledges), we need not address them.

Member Hayes would find that the general decision to lay off employees in response to a regularly recurring seasonal decline in business was made prior to the election and, as such, was not a mandatory subject for bargaining. Accordingly, the fact that there would be lawful work force reductions in the later months of 2010 should be taken into account in compliance proceedings determining what backpay, if any, the Respondent owes to individual laid-off employees. As to the Respondent's violation of Sec. 8(a)(5) for failing to bargain about individual layoff decisions made after the election, Member Hayes notes that the Respondent has failed to except to the judge's finding that the number, timing, and terms of these individual layoffs were not made in accord with a past practice of limited discretion. Member Hayes further notes that the Respondent did not contend that economic exigencies should excuse it from having to bargain to an overall agreement or impasse in the parties' negotiations for a first contract before implementing the individual layoffs. In his view, this is precisely the kind of situation that calls for a balanced approach accommodating the legitimate need for an employer to continue making daily operational decisions necessary to the maintenance of its business during the initial stage of a collective-bargaining relationship. Consistent with the rationale of *Stone Container*, 313 NLRB 336 (1993), and *RBE Electronics of S.D.*, 320 NLRB 80, 81–82 (1995), he would have required the Respondent here to give the Union adequate notice and opportunity to bargain about the layoffs. However, he would have permitted the Respondent to unilaterally implement individual layoffs prior to the parties' reaching agreement or impasse on this discrete issue, subject to continued postimplementation bargaining.

We also agree with the judge, for the reasons she stated, that the Acting General Counsel did not establish that the Respondent subcontracted unit work in 2010 or 2011. As a result, we find it unnecessary to reach the judge's further finding that the Respondent had an established past practice of subcontracting unit work that justified its action.

[2] We shall modify the judge's recommended Order to conform to the Board's standard remedial language.

[1] William K. Wolf replaced Nathan Bishop, Esq., who initially represented the Union at the outset of the hearing.

[2] All dates are in 2010, unless otherwise specified.

September 23, 2011.[3]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by counsel for the Acting General Counsel[4] and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a domestic corporation with its principal office and place of business located at 345 Sunrise Highway, Freeport, New York, and with a place of business located at 939 Church Street, Baldwin, New York, where it is engaged in the manufacture, retail sale, and installation of fences. During the 12-month period preceding the issuance of the complaint, a period which is representative of its annual operations in general, in the course and conduct of its business, Respondent derived gross revenues in excess of $500,000 and purchased and received at its Freeport, Long Island facility goods and materials valued in excess of $5000 directly from suppliers located outside the State of New York. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Operations

Respondent manufactures, sells, and installs fences. The company is owned by Scott Rosenzweig. Bryan Cinque is his primary assistant and also serves as office manager.[5] Cinque has been working for the Company for approximately 6 years and handles sales, payroll, and customer relations, among other things. Respondent has been in existence for 32 years, and Rosenzweig has been involved with its operations for this period of time. The Company's operations primarily involve residential work; however, as will be discussed below, Respondent performs commercial work as well.

Following an election on May 21, on June 3, the Union was certified as the exclusive collective-bargaining representative of the following unit of employees:

> All full-time, regular part-time and seasonal drivers, installers, driver-installers, helpers, installer-helpers, yard workers and carpenters employed by the Employer at its facility located at 939 Church Street, Baldwin, New York excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

It is undisputed that Respondent is a seasonal operation, performing both residential and commercial fence manufacture and installation and, to a lesser extent, deck manufacture and installation as well. Respondent is busiest during the months of April through the first half of July, primarily with residential work which then historically diminishes as the summer progresses into autumn. As Rosenzweig testified, the Company will typically receive orders for commercial work during the months of October through December, as companies may want to spend some money prior to the end of the year for tax or other reasons. At full capacity, Respondent employs about 130 employees, about 60 of whom are represented by the Union. The other 70 employees are salesmen, counter persons, expeditors, and factory workers who are involved in the Respondent's manufacturing processes.[6] Approximately 90 percent or more of Respondent's work is residential in nature; the remainder is commercial.

Rosenzweig runs his business along with a handful of others. In addition to Cinque, assisting in Respondent's operations are Jerry Leverich, who expedites installations, and Pat Quintivalle who supervises sales. The Company has three sales offices, a manufacturing facility, a truck yard, and two storage yards. The vast majority of the Company's work is performed in Long Island, New York. Respondent typically assigns two employees to a truck; one is a mechanic and the other a helper who is a less-skilled employee. At peak season, Respondent operates about 29 or 30 trucks.

During the busy season, trucks are loaded the prior evening and employees leave the facility at about 7:30 a.m. Employees will be assigned to work as many as 55 hours per week. Respondent operates with a backlog of work, and customers may be obliged to wait several weeks for a fence, and sometimes as long as 7 or 8 weeks.[7]

Once the backlog diminishes, and the slow season approaches, Respondent reduces the hours for its employees to 40 hours per week, thus eliminating overtime. During the winter, Respondent employs approximately 22 installers, a number of which may be part-time employees. The amount of business which is conducted during the winter depends upon the weather and business demands. If the climate is moderate, clients may place orders for fences. If there is snow and ice, fence installation cannot take place and employees will work very few hours and may seek other work or ask to be placed on unemployment. Respondent typically recalls its employees to work when work picks up the following season.

B. The Alleged Unilateral Changes

During the summer of 2010, as the backlog diminished, Respondent eliminated the overtime assigned to its employees. As Rosenzweig testified, this typically occurs after the July 4th holiday,[8] and has been the case for some 5 to 10 years. A sign is posted by the timeclock requesting that employees return to the facility to clock out at 4 p.m. In addition, supervisors in the

[3] After the initial hearing date the Employer and the Union entered into settlement negotiations, which proved unsuccessful. The matter was then resumed.

[4] Referred to here as the General Counsel.

[5] Rosenzweig and Cinque were the only witnesses to testify here.

[6] Most of the fences manufactured by Respondent are made of a plastic material; however the company manufactures and installs wood fences and decks, as well.

[7] As Rosenzweig testified, this was particularly the case during the summer of 2010 due to a large late-winter storm in March 2010 which caused massive damage. There was a surfeit of insurance money paid out for fence work, and homeowners took advantage of it.

[8] Rosenzweig explained that, beginning at this time of year, families typically spend more time in their yards and, consequently, do not want fence work performed at this time.

field will remind employees to return the trucks by that time. From time to time, Leverich may authorize employees to work overtime to complete a particular assignment. Rosenzweig testified that the decision to eliminate overtime is consistent with the seasonal nature of its operations and is "strictly financial." He also acknowledged that in July 2010 he did not consult with the Union prior to issuing such instructions to employees. After Labor Day, Respondent switched to a 4-day workweek. Again, the Union was not consulted with regard to this matter.[9]

At some point beginning in July 2010 and continuing into August, Respondent began laying off employees. As Rosenzweig testified, once the backlog and work orders diminish, he brings the matter to Leverich's attention and Leverich decides who is to be laid off, based upon employee skills and performance and overall company operations. It is admitted that Respondent did not consult with the Union prior to laying off employees in 2010.[10] According to Rosenzweig, up to about 8 or 10 years ago, Respondent did not lay off employees during its off season and maintained its work force by having employees manufacture inventory. Beginning at that point, however, the Company could no longer afford to retain employees on the payroll during the off season so it began laying off employees as work declined, and has continued to do so since that time.[11]

Respondent has historically employed subcontractors during its peak season and when there are commercial or other types of jobs which the existing work force is not qualified to do. These contractors perform both commercial and residential work. Rosenzweig testified that this has been his practice for the entire time he has operated the business.

Cinque testified that a subcontractor would perform residential services when the Company was overloaded with work but otherwise would do jobs that so-called "house crews" did not typically perform. According to Rosenzweig, the bulk of his commercial work is performed by subcontractors because of their skills and abilities and for purposes of efficiency.[12] One example offered by Rosenzweig concerned an order to place a 50-foot fence around a baseball field. Rosenzweig testified that during the busy season, he will use the services of five or six subcontractors. Subcontractors use their own trucks, labor, and equipment. They are paid piece work, by each post placed into the ground.

Rosenzweig testified that after the storm of March 2010, he called his employees into work, and a number of subcontractors as well, because his work force was not sufficient to handle the volume of orders he received. Rosenzweig admitted that he did not contact the Union prior to hiring subcontractors in 2010, and the record demonstrates that he continued to make payments for the services of certain subcontractors after the election and the Union's certification through the end of 2010. Rosenzweig testified that the dates of the payments made to subcontractors might not necessarily reflect exactly when such work was performed, depending on the cash flow of the business, as he typically makes payroll first and then pays the subs.

The General Counsel offered into evidence certain records reflecting payments made to four subcontractors during the period following the election and the Union's certification through December 2010: Tim Gage, Francisco Ramos, Mario Fences, and Leiva Fence. Gage received payment from Respondent through December, Ramos received payment through mid-August, and both Leiva Fence and Mario Fences received payments until some time in December.

The testimony adduced regarding the type of work performed by the subcontractors who received payments during the period from August through December 2010 was as follows:

> Q. What were these checks for to Tim Gage ?
>
> A. Tim does work for me. Tim does wood work for me
>
> Q. He does installation of fences?
>
> A. Just wood fences. He doesn't do the plastic.
>
> Q. And turning to the third page of the exhibit, Francisco Ramos, it shows checks that were issued to him through August 19, 2010. What kind of work does he do for you?
>
> A. Francisco could do everything. Decks. Francisco is a very talented carpenter.
>
> Q. He does fence work for you?
>
> A. He does fence, decks, etc.
>
> Q. And these checks would be for that work?
>
> A. And commercial work, yes, sir.
>
> Q. What commercial work did Mr. Ramos do for you?
>
> A. At the moment, I don't have the bills. He would submit bills with what he did. I don't have them in front of me. What Francisco does, he could weld. He can do anything, decking.
>
> Q. Mario Fences. On the last page it shows checks being issued to Mario Fences through December 2010. That would be for fence work?
>
> A. The money I pay him is for work, yes . . . He does work for me, for work performed for me.
>
> Q. And the same is true of Leiva Fence, the first page?
>
> A. Yes.

In addition, Rosenzweig was questioned and offered general testimony about two other contractors: Cabrerra, who performs residential work, and Stan Miles, who does commercial work for Respondent. Neither of these subcontractors appeared on the records produced by Respondent relating to the period after

[9] The reduction to a 4-day work eek was not specifically alleged as an independent unfair labor practice.

[10] It appears from the record that communications with the Union are handled by Rosenzweig and Cinque.

[11] A summary of records concerning the 2010 layoff which was placed into evidence by counsel for the General Counsel indicates that the first layoff for that season took place on July 7 and involved one employee. There were several other employees laid off that month: on July 9, 16, and 30. In total, six employees were laid off prior to the commencement of collective bargaining in August. Twenty-three employees were laid off after bargaining commenced, and there are 15 employees whose lay off date is unknown. It should be noted, however that this exhibit was admitted into the record as a clarification of the pleadings, rather than as substantive evidence of who was laid off and when. I note, however, that Rosenzweig admitted and there is no dispute that layoffs occurred beginning at a time "close to August" as work declined and continued thereafter.

[12] The record reflects that certain subcontractors utilized by Respondent are former employees who then started their own companies.

the election through December 2010. Rosenzweig testified that Cabrerra began subcontracting in May 2010 and was doing work for the Company this year as well. When counsel for the Charging Party asked Cinque whether part of the work performed by subcontractors is similar to the work done by Respondent's employees, he replied, "Not typically, no."

C. The Parties' Collective-Bargaining Negotiations

Respondent and the Union first met to bargain for a collective-bargaining agreement on August 3. Subsequent meetings were held on August 23 and March 23, 2011. These meetings were attended by Rosenzweig, Cinque, Union Officials Demos Demopoulos and Jack Dresch, and two bargaining unit employees. There were also several bargaining proposals and email communications exchanged between the parties, the relevant portions of which are set forth below.

In response to questions from counsel for the General Counsel, Rosenzweig testified generally that the Union proposed that layoffs be conducted according to seniority and that the parties have not reached agreement on this issue. In addition, the issue of subcontracting came up and, as Cinque testified, Respondent advised the Union that it had always used subcontractors when they were needed and for specialty work. The Union thereafter modified its initial subcontracting proposal, as set forth below.

At the parties' first meeting, the Union presented the Employer with an initial draft agreement which contained the following proposals:

> SENIORITY: A seniority list shall be established in accordance with employment by the company.
>
> WORK PROTECTION: The Employer shall not contract out or subcontract to others work in any category unless all employees on the seniority list are fully employed. In the event that the Employer utilizes subcontractors in violation, all employees on the seniority list who did not work and should have worked on the day or days that such violation occurred shall be paid for that day or those days.

At this initial meeting, the parties primarily discussed the Union's wage and health benefit proposals.

A second meeting was held in late August. There was disagreement between the parties on the issues of wages, health insurance, and the Union's seniority proposal. According to Cinque, there was no substantive discussion of the issues of subcontracting, layoffs, or employee hours of work.

After this second meeting, on September 13,[13] Demopoulos sent the Employer revised proposals entitled "Negotiations Draft." Section 9, entitled "Seniority" contained the following provision:

> Section 9—Seniority
>
> A. Seniority shall be on the basis of classification and qualification at all times based on the date of commencement (date of hire) and further providing the senior employee has the necessary qualification to perform the available work. All work shall be assigned on a seniority basis.
>
> B. All layoffs shall be determined by the Employer, that is, Employees will be reviewed as to background, skills and prior training when being considered for layoffs. In the event that additional employees shall be needed, all persons covered by this Agreement previously laid off shall be recalled based on background, skills and prior training provide, however, that any Employee so recalled must report to work within five (5) days after notification by the Employer, or failing to do so, shall forfeit all seniority rights.
>
> C. Notwithstanding any of the foregoing, any employee who is terminated for cause or who voluntarily resigns shall forfeit all seniority rights.

Section 16, entitled "Work Protection" provides:

> Section 16—Work Protection
>
> The Employer shall not contract out or subcontract to others work in any category covered by this Agreement, unless all employees on the seniority list are fully employed, and qualified to do said work. If a violation of this section occurs, all qualified employees on the seniority list on the seniority list who did not work and should have worked on the day or days that such violation occurred, shall be paid for that day or days.

On March 22, 2011, Demopoulos sent Respondent an email containing a copy of the Union's proposals in the form of a draft contract (draft 2). The relevant provisions pertaining to seniority and layoffs are as follows:

> Section 9—Seniority
>
> A. Seniority shall be on the basis of classification and qualification at all times based on the date of commencement (date of hire) and further providing the senior employee has the necessary qualification to perform the available work. All work shall be assigned on a seniority basis.
>
> B. All layoffs shall be determined by the Employer, that is, Employees will be reviewed as to background, skills and prior training when being considered for layoffs. In the event that additional employees shall be needed, all persons covered by this Agreement previously laid off shall be recalled based on background, skills and prior training provide, however, that any Employee so recalled must report to work within seven (7) days after notification by the Employer, or failing to do so, shall forfeit all seniority rights.
>
> C. Notwithstanding the foregoing, any employee who is terminated for cause or who voluntarily resigns shall forfeit all seniority rights.

The draft additionally contained the following work protection clause:

> Section 16—Work Protection
>
> The Employer shall not contract out or subcontract to others work in any category covered by this Agreement, unless all employees on the seniority list are fully employed, and qualified to do said work. If a violation of this section occurs, all qualified employees on the seniority list on the seniority list who did not work and should have worked on the day or days

[13] According to Cinque, the parties met again in late August, but no testimony was adduced about this meeting.

that such violation occurred, shall be paid for that day or days.

There were three additional contract drafts submitted by the Union on or about April 12, May 13, and June 1, 2011. The "Seniority" and "Work Protection" provisions remained unchanged. The Employer's response to the Union's April 12 proposal reflects that the Employer agreed to the Union's "Work Protection" proposal, as set forth above. To date, there has been no agreement on the Union's "Seniority" proposal and in a response to the Union's June 1 contract proposal, the Employer specifically rejected it.

Analysis and Conclusions

This case involves certain changes to terms and conditions of employment made by Respondent after the election of and certification of the Union both prior to and during collective bargaining for an initial contract. The General Counsel has alleged that the Employer unilaterally, and unlawfully, announced a new rule requiring employees to punch out at 4 p.m., hired subcontractors, laid off employees, and reduced the work hours of employees. The General Counsel further alleges that since commencing collective bargaining with the Union on August 3, Respondent hired subcontractors and laid off employees without bargaining with the Union to a good-faith impasse or reaching agreement. Respondent contends that the parties have either bargained over the alleged unlawful actions or that the Union has effectively waived its right to bargain over these matters as it has indicated no desire to do so. Respondent further contends that even if it were to be assumed that Respondent and the Union had not bargained over these subjects or there was no effective waiver, there was no violation since the decision to implement the allegedly unlawful actions was made before Respondent became obligated to bargain with the Union.

D. The Alleged Unlawful Layoff of Employees

As a general matter, it is well settled that, once a majority of employees in an appropriate unit select a union to represent them, their employer is obligated to bargain with that union regarding the employees' wages, hours and terms and conditions of employment and may not unilaterally alter those terms. *NLRB v. Katz*, 369 U.S. 736 (1962). It is also well established, with limited exceptions, that the decision to lay off employees for economic reasons is a mandatory subject of bargaining. *McClain E-Z Pack, Inc.,* 342 NLRB 337 (2004); *Toma Metals, Inc*., 342 NLRB 787, 787 fn. 1 (2004); *NLRB v. Advertising Mfg. Co*., 823 F.2d 1086, 1090 (7th Cir. 1987), enfg. in relevant part *Advertisers Mfg. Co*., 280 NLRB 1185 (1986). Similarly, the "particular hours of the day and the particular days of the week during which employees shall be required to work are subjects well within the realm of 'wages, hours, and other terms and conditions of employment' about which employers and unions must bargain." *Meat Cutters Local 189 v. Jewel Tea Co*., 381 U.S. 676, 691 (1965). As the Board has held, this is generally the case even with respect to layoffs and changes in employees' work schedules over which the employer previously exercised unlimited discretion. See, e.g., *Adair Standish Corp*., 292 NLRB 890 fn. 1 (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990) (despite past practice of implementing discretionary layoffs, after employees selected union as their bargaining representative, employer could no longer lay off employees without consulting with the union); *NLRB v. Advertising Mfg. Co*., supra at 1090 ("Layoffs are not a management prerogative. They are a mandatory subject of collective bargaining. Until the modalities of layoff are established in the agreement, a company that wants to lay off employees must bargain with the union."). Where a company effectuates a layoff due to a decline in work orders, the issues of whether those layoffs should be effected, whom to include in such layoffs and what if any benefits should be given to laid off employees are mandatory subjects of collective bargaining. *Dickerson-Chapman, Inc*., 313 NLRB 907, 942 (1994).

In addition, the effects of a layoff are also a mandatory subject of bargaining, and as is the case with decisional bargaining, effects bargaining also requires an employer to provide a union with notice of the layoffs before they occur in order to satisfy the employer's duty to bargain over the effects of the layoffs. *Kajima Engineering & Construction*, 331 NLRB 1604, 1620 (2000); *Geiger Ready-Mix Co. of Kansas City*, 315 NLRB 1021, 1021 fn. 8 (1994), enfd. 87 F.3d 1363 (D.C. Cir. 1996). The duty to bargain over the decision to lay off employees includes the duty to bargain over the effects of the layoff. *Toma Metals, Inc*., supra.

The Respondent argues that it has continued to operate in the same fashion for the past 8 to 10 years, due to the seasonality of its business, in conjunction with its financial condition. Thus, beginning in July of each year, as residential work began to decline, Respondent reduced and then eliminated overtime hours; as work declined further, Respondent then reduced work hours and subsequently laid off employees and has continued to do so each and every year. As Respondent argues, this practice had occurred with such regularity and frequency that employees could and reasonably did expect the practice to continue and reoccur on a regular and consistent basis. Respondent contends that since these decisions were made years ago, well before the Union appeared on the scene, and well before its bargaining obligation attached, it did not violate Section 8(a)(5) of the Act by implementing such decisions.

The General Counsel argues that any reliance upon Respondent's past practice is misplaced. *Porta-King Building Systems*, 310 NLRB 539, 543 (1993); *Eugene Iovine, Inc*., 328 NLRB 294, enfd. mem. 1 Fed. Appx. 8 (2d Cir. 2001); (unpublished); *Adair Standish Corp*., supra. In *Eugene Iovine*, the employer reduced the hours of its employees without bargaining with their newly-certified bargaining representative. The employer defended this unilateral action on the ground that it had previously reduced hours for various reasons. The Board initially found that the respondent had failed to establish a past practice and next, given that there was "no reasonable certainty" as to the timing or criteria, the respondent's decision to reduce its employees' hours of work involved significant management discretion. The Board then stated that both the Board and the courts "have consistently held . . . such discretionary acts ar . . . precisely the type of action over which an employer must bargain with a newly certified union." 328 NLRB at 294 (citations and quotations omitted). The Board cited *Adair Standish* for the proposition that, because of the existence of newly certified union, an employer may no longer continue

unilaterally to exercise its discretion with respect to layoffs.

Subsequently, in *Eugene Iovine, Inc*., 356 NLRB 1056 fn. 3 (2011), 353 NLRB 400, 405–406 (2008), the Board held that the acquiescence of a previous union in a past practice of unilateral layoffs does not exempt an employer from providing notice and an opportunity to bargain to the union currently representing bargaining unit employees. In particular, the Board affirmed ALJ's conclusion that "the overwhelming weight of case law supports the view that nonunion employers' past practices will not justify unilateral implementation of mandatory subjects of bargaining once a union represents the employees," characterizing it as "fully consistent with Board precedent" 356 NLRB 1056 fn. 3, 353 NLRB at 406 fn. 9. The Board has repeatedly held that "past practice in effectuating discretionary employment decisions is not a cognizable defense to unilateral change allegations after the union's certification." *Essex Valley Visiting Nurses Assn*., 343 NLRB 817, 843 (2004), citing *Mackie Automotive Systems*, 336 NLRB 347 (2001); *Adair Standish*, 292 NLRB 840 fn. 1 (1989). See also *Wilen Mfg. Co*., 321 NLRB 1094, 1097 (1996) (employer's contention that layoffs occurred every year during slow period found not to be a defense in the absence of providing the union a reasonable opportunity to bargain collectively over the layoff procedure).

As noted above, however, Respondent does not rely solely upon its asserted past practice as a defense to its actions, but additionally argues that the challenged decisions were made prior to the Union becoming the collective-bargaining representative of its employees. In support of these contentions, Respondent relies upon *Starcraft Aerospace, Inc*., 346 NLRB 1228 (2006); and the cases cited there. In *Starcraft Aerospace*, the named respondent laid off employees the day after a representation election in which employees voted in favor of representation. The Board, reversing the administrative law judge in this regard, found that the decision to lay off the employees had been made prior to the election based upon the exigent circumstances of the owner's terminal medical condition and the increasingly poor financial condition of the business. In concluding that the layoffs were not unlawful the Board stated:

> We find the Respondent did not violate Section 8(a)(5) and (1) of the act by laying off the unit employees. In general, an employer violates Section 8(a)(5) and (1) by unilaterally implementing changes in the terms and conditions of employment of its represented employees without satisfying its bargaining obligation. If however, an employer makes a decision to implement a change *before* being obligated to bargain with the union the employer "does not violate Section 8(a)(5) by its later implementation of that change."

346 NLRB at 1230 (quoting *SGS Control Services*, 334 NLRB 858, 861 (2001); citing *Consolidated Printers Inc*., 305 NLRB 1061 fn. 2, 1067 (1992) (emphasis in original)).[14]

Moreover, as set forth in *Consolidated Printers*, under this analysis, it is not essential that the precise date of the decision be established. The critical fact is whether the Respondent's decision predated the election. 305 NLRB at 1061 fn. 2. See also *SGS Control Services*, supra at 861 fn. 3.[15]

Here, the unrebutted testimony of both Rosenzweig and Cinque establishes Respondent had, in fact, made a general decision to reduce employees' hours and lay off employees prior to the Union's certification, consistent with years of past practice. Moreover, there is substantial evidence that work diminished at seasonably predictable times. Nevertheless, the decision to lay off individual employees, which in 2010 occurred after the employees had voted for union representation, was made by Leverich, in response to the Company's assessment of its economic condition and was based upon individualized subjective factors, taking into account employee work skill and company operations. These decisions were made gradually as work diminished, and not at any particular announced time or in response to one event. In addition, it must be noted that Respondent continued to employ roughly one-third of the bargaining unit during the off-season in 2010–2011, by necessity suggesting that determinations were made as to who would remain employed during these months. Thus, each decision to lay off an employee required Respondent to exercise substantial discretion to with regard to its implementation. See *Warehouse & Office Workers Local 512 v. NLRB*, 795 F.2d 705, 711 (9th Cir. 1986) (economic layoffs, by their nature, are inherently discretionary involving "subjective judgments of timing, future business, productivity and reallocation of work").

As noted above, the Board and the courts have consistently held that these discretionary decisions are the sort of employer action to which the statutory duty to bargain applies. *NLRB v. Katz*, 369 U.S. 736, 746 (1962) (unilateral merit wage increases were unlawful because they were "in no sense automatic, but were informed by a large measure of discretion"); *Aaron Bros. Co. v. NLRB*, 661 F.2d 750, 753 (9th Cir. 1981) ("longstanding exception" suggested in *Katz* places a heavy burden on the employer to show an absence of employer discretion in determining the size or nature of a unilateral employment change); *Adair Standish*, supra (discretionary layoffs properly the subject of bargaining); *Eugene Iovine*, 328 NLRB 294 (unilateral reduction in work hours violated the Act where there was no reasonable certainty as to timing or criteria and decision involved significant management discretion); *Eugene Iovine*, 356 NLRB 1056 (duty to bargain over discretionary layoffs). See also, *Colorado Ute Electric Assn*., 295 NLRB 607, 608 (1989); *Oneita Knitting Mills, Inc*., 205 NLRB 500 fn. 1 (1973) (implementation of a merit raise program which involves discretion in determining the amounts or timing of the increases is a matter to which the bargaining representative is entitled to be consulted).

[14] In *SGS Control Services*, the Board found that the respondent did not violate the Act when, consistent with its preelection decision, it implemented an overtime change and ceased paying to its California nonexempt employees overtime for work in excess of 8 hours per week in a workday, and instead paid overtime only for hours worked in excess of 40 hours per workweek.

[15] In this regard, the Board has also found that the ability of an employer to implement the change is not affected by its failure to inform the union or employees of its plans prior to the election. See *Consolidated Printers*, supra at 1068.

In *Consolidated Printers*, supra at 1068, relied upon by Respondent, the Board, adopting the decision of the administrative law judge, found that there was no duty to bargain over layoffs where the decision had been made prior to the election. However, in that case the judge also found that "it may fairly be inferred" that layoffs which occurred subsequent to the election had been decided upon at a time after the respondent's bargaining obligation attached and the failure to bargain over those layoffs were not excused by past practice (quoting *Adair Standish Corp*., supra).

Respondent further argues that the parties have either bargained over the subjects of the alleged 8(a)(5) violations or the Union has either consented to or indicated no desire to bargain over those matters and has therefore effectively waived its right to bargain. In support of these contentions, Respondent points to the fact that the Union's initial bargaining proposal did not refer to any of the alleged unilateral changes with the exception of subcontracting,[16] and that this provision was revised in subsequent drafts which provided that a prohibition on subcontracting was limited to bargaining unit work where bargaining unit employees were qualified to do such work.

Respondent additionally contends that proposed collective-bargaining agreements and, in particular, the Union's "Seniority" proposal recognized the right of the Respondent, in its discretion, to lay off employees. As Respondent argues in its posthearing brief: "Somewhat ambiguous seniority rules were proposed for lay offs and recalls, but no proposal called for any limitation on or prohibition of, the right of the Respondent to lay off employees or called for bargaining in the event of, and prior to, any lay off of employees by Respondent." In this regard, the Respondent contends that the seniority language in section 9 refers only to the implementation of layoffs and recalls but not to the right of Respondent to lay off employees, and that such a right is expressly granted to the Respondent by the second paragraph of the "Seniority" provision.[17]

In support of the foregoing arguments, Respondent relies upon *Vandalia Air Freight*, *Inc*., 297 NLRB 1012, 1013–1014 (1990). In that case, the Board concluded that the union had waived its bargaining rights where it waited until after a merger decision had been effectuated to request bargaining over the effects of the decision. As the Board found, "when an employer notifies a union of proposed changes in terms and conditions of employment, it is incumbent upon the union to act with due diligence in requesting bargaining" (quoting *Jim Walter Resources*, 289 NLRB 1441, 1442 (1988)). For various reasons, however, this authority is not dispositive of the issues presented here.

To establish waiver of a statutory right to bargain over mandatory subjects, there must be a clear and unmistakable relinquishment of that right. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 702 (1983); *Exxon Research & Engineering Co*., 317 NLRB 675 (1995), enf. denied on other grounds 89 F.3d 228 (5th Cir. 1996). Waiver can occur in any of three ways: by express contract language, by the parties' conduct (including past practice, bargaining history, action, or inaction) or by a combination of the two. *American Diamond Tool*, 306 NLRB 570 (1992); *Chesapeake & Potomac Telephone Co. v. NLRB,* 687 F.2d 633, 636 (2d Cir. 1982). In addition, the Board has held that in situations such as the one presented here, where the parties have not yet completed their first contract, the waiver issue is properly decided on evidence of the parties' conduct. *American Diamond Tool*, supra. It is well settled that the party asserting waiver has the burden of establishing its existence. *Pertec Computer*, 284 NLRB 810 (1984).

Here, it is undisputed that the Union was the certified collective-bargaining representative of the unit employees and, moreover, that Respondent neither provided notice nor bargained with the Union prior to its implementation of layoffs. Before such action, the Board requires prior notice "so that the union may have a reasonable opportunity to evaluate the proposal and present a counterproposal before the change takes place." *San Antonio Portland Cement Co*., 277 NLRB 309, 313 (1985). In arguing that a waiver occurred here, the Respondent argues that the Union became aware of layoffs either at the time or shortly after they occurred and that the Union had the opportunity to object during bargaining, which it failed to do. These factors, however, do not countervail the fact that the 2010 layoffs were presented to the Union as a fait accompli. While the record does not contain evidence of how or when the Union learned of the layoffs, it is admitted that Respondent undertook these actions without providing notice to or consulting with the Union. Under such circumstances, the Union's failure to object is not tantamount to waiver. The Board has held that when a union learns of an employer's decision regarding a mandatory subject after its implementation, it will not find that the union's failure to request bargaining over that action constitutes a clear and unmistakable waiver of its right to bargain. *Alpha Biochemical Corp*., 293 NLRB 753 fn. 1 (1989); *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1021–1024 (2001) (and cases cited therein) ("[A]n employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counterarguments or proposals.").

Moreover, Respondent's contention that the so-called "ambiguous seniority rules" set forth in section 9 of the Union's draft contract refer only to the implementation of layoffs and recalls but not to Respondent's right to lay off employees is beside the point. As has been discussed above, the Board and the courts have made clear that an employer's bargaining obligation encompasses not only the decision to make a change in terms and conditions of employment, but the manner in which such changes are effectuated as well as their effects. See, e.g., *NLRB v. Katz*, supra at 746; *Office Workers Local 512 v. NLRB*,

[16] In particular, Respondent notes that no proposal of the Union, oral or written, dealt with or referred to the right of Respondent to require employees to punch out at 4 p.m. each day, or to reduce hours of work of bargaining unit employees. In addition, the Union's initial written proposal did not address the issue of layoffs.

[17] The specific language relied upon by Respondent, reiterated here for ease of reference, is the following: "All layoffs shall be determined by the Employer, that is, Employees will be reviewed as to background, skills and prior training when being considered for layoffs. In the event that additional employees shall be needed, all persons covered by this Agreement previously laid off shall be recalled based on background, skills and prior training provide, however, that any Employee so recalled must report to work within seven (7) days after notification by the Employer, or failing to do so, shall forfeit all seniority rights."

supra at 711; *Adair Standish Corp*., supra at 890 fn. 1; *Eugene Iovine*, 356 NLRB 1056 fn. 3.

When the parties are engaged in collective-bargaining negotiations, the Board finds that an employer's obligation to refrain from unilateral changes encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole. See *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). Here, there is no contention, or evidence, that the parties reached agreement on a contract as a whole or that they had reached impasse at any relevant time. Moreover, the evidence establishes that the Respondent did not agree to the "Seniority" proposal as set forth in the Union's draft contract and, in fact, rejected it. There is similarly no evidence that the Union's language regarding layoffs, relied upon by Respondent, was somehow discussed independently or severed from its overall "Seniority" proposal and made the subject of a separate, express agreement at the time layoffs were being implemented. The most one can conclude from the evidence here is that in the event the Employer was amenable either to the proposed contract as a whole (which, at the time, it was not), or at the very least to the Union's "Seniority" proposal in its entirety (a proposal Respondent expressly rejected),[18] the Union would then agree to layoffs "determined by the Employer . . . according to background, skills and prior training." Thus, the evidence adduced in this record falls short of showing that these matters were "fully discussed" and "consciously explored" during negotiations. *Davies Medical Center*, 303 NLRB 195, 204 (1991), or that there was at any relevant time a clear and unmistakable waiver of the Union's right to bargain over this mandatory subject. *Metropolitan Edison Co*., supra. Accordingly, I cannot conclude that Respondent has met its substantial burden of proving waiver over this issue.[19]

Accordingly, I find that by failing and refusing to give the Union notice and an opportunity to bargain over the layoff of bargaining unit employees, or the effects of these layoffs, and by engaging in such unilateral conduct during bargaining for an initial collective-bargaining agreement in the absence of agreement or impasse, Respondent violated Section 8(a)(1) and (5) of the Act.

[18] In this regard, it may fairly be inferred from Respondent's outright rejection of the "Seniority" proposal that it construed the language set forth in the first paragraph of that provision to constitute an impermissible limitation on its discretion to lay off and recall employees.

[19] I find that *American Diamond Tool* is distinguishable. There, the Board held that a union waived its right to bargain over economic layoffs by failing to request bargaining after learning of the layoffs. In that case, however, the Board relied upon a confluence of several factors to conclude that waiver occurred. In particular, the Board concluded that the parties had bargained over the issue and the union "expressly signaled its willingness to permit such conduct in the future." 306 NLRB 571. See also *Eugene Iovine*, 328 NLRB 294 fn. 1. Here, as discussed above, I have found that the matter was not fully bargained and that the Union never "expressly signaled" a willingness to permit unilateral layoffs.

E. The Alleged Announcement of a New Work Rule and Reduction in Work Hours

With regard to the requirement that employees punch out at 4 p.m. and the alleged reduction in employees' work hours, I find that, unlike the layoff decisions, the record demonstrates that these decisions were undertaken in accordance with customary business operations, as a regular matter, on an annual basis, at the same time each year, affected the bargaining unit as a whole and did not vary significantly in kind or degree from what had occurred in prior years. Thus, Respondent has established the existence of a past practice as well as a reasonable certainty as to the timing and criteria for such employment decisions. Under these circumstances, I find that, in the context of the well-documented and unrebutted evidence of the Employer's seasonal operations, this amounted to a permissible "continuation of the status quo . . ." *Katz*, 369 U.S. at 746.

The situation here is analogous to one presented by *San Antonio Portland Cement Co*., 277 NLRB at 313, where the employer had a longstanding mandatory overtime policy and implemented the practice, without notice to its employees' bargaining representative, after becoming obligated to recognize and bargain with the union. The Board concluded that the employer's actions were not unlawful inasmuch as the mandatory overtime policy predated the employer's obligation to bargain with the union. By contrast, in *Eugene Iovine*, 328 NLRB at 294, the Board concluded that a violation of Section 8(a)(5) had occurred where the employer failed to establish a past practice and further failed to establish that its reduction of employees' work hours was consistent with its conduct in prior years. In that case and, in contrast to the situation here, the employer failed to identify the specific circumstances surrounding its postelection reduction in work hours and thus failed to show that the reduction comported with its previous conduct. See also *Starcraft Aerospace*, supra at 1230, *Consolidated Printers*, supra at 1068 (no duty to bargain over layoffs where the decision had been made prior to the election); *Long Island Day Care Services,* 303 NLRB 112, 114 (1991) (holiday observance became term and condition of employment prior to certification of union and onset of contract negotiations); *Embossing Printers,* 268 NLRB 710 fn. 2 (1984) (decision to cancel Christmas bonus made prior to union's advent).

Accordingly I recommend that these allegations of the complaint be dismissed.

F. The Alleged Unlawful Subcontracting

The subcontracting of bargaining unit work is a mandatory subject of bargaining, unless it involves a substantial capital commitment or change in the nature, scope or direction of its business. See, e.g., *OGS Technologies, Inc*., 356 NLRB 642, 644–645, slip op. at 3–4 (2011), discussing *Fibreboard Corp., v. NLRB*, 379 U.S. 203 (1964); *Mission Food*, 350 NLRB 336, 344–345 (2007).

Where subcontracting involves merely "the substitution of one group of workers for another to perform the same work," the union must be given notice and a meaningful opportunity to bargain. *Mission Foods*, 350 NLRB at 344.

Here, the evidence establishes that Respondent has been subcontracting work for over 30 years. Some of this work is of the

type traditionally performed by its "house crews," i.e., residential fence installation, but much of it is not. The record, as developed, demonstrates that subcontractors are used primarily for commercial work, or for work requiring special skills. According to Rosenzweig and Cinque, this is not the type of work performed by bargaining unit employees.[20] There is also evidence that subcontractors are used when there is an overflow of work which is of the sort typically performed by unit employees. There is, however, no specific evidence that such work was performed after the election. While the evidence does show that Respondent had been making payments to subcontractors up until December 2010, and continues to use subcontractors, there is insufficient evidence as to the precise nature of the work, when subcontractors were contracted to perform such work, when the work was actually performed or whether such payments were for work which traditionally had been assigned to unit employees. There is also no evidence that work was taken from unit employees and transferred to subcontractors or that subcontractors performed work which had previously been assigned to or could have been performed by laid off unit employees.

It appears that the General Counsel is requesting that I assume a violation of Section 8(a)(5) has occurred from the following facts: subcontractors have at times performed residential fence installation and, more generally, bargaining unit work; subcontractors received payments for work performed during a period of time after the election in which the Union was selected as the exclusive bargaining representative; Respondent continues to use subcontractors, and the Union was not given prior notice and an opportunity to bargain over the use of subcontractors. The General Counsel has, however, failed to present affirmative evidence that at any material time Respondent has subcontracted bargaining unit work. As has been noted, the General Counsel bears the burden of proof as to each element of his prima facie case. See *Consolidated Printers*, supra at 1067. Here, the evidence adduced by the General Counsel is simply insufficient to allow me to conclude that the Respondent has violated the Act, as alleged. While it is entirely possible that subcontractors were, in fact, doing unit work after the election, it is also possible that they were not. I cannot reach a determination of unlawful conduct based upon a record such as this one.

Moreover, I find that under the particular circumstances of this case, where Respondent has made a showing that subcontracting had been the norm for many years and had been an integral part of Respondent's business operations during the period prior to the election, the General Counsel has failed to present sufficient evidence to show how Respondent's continuance of this pattern and practice constituted any sort of change, unilateral or otherwise, in the terms and conditions of employment of unit employees after the selection of the Union as bargaining representative or resulted in any significant change in the job tenure of unit employees. This is particularly the case where there is an absence of evidence that bargaining unit work was transferred to or performed by subcontractors after the election and certification of the Union as bargaining representative, or that there was a "substitution of one group of workers for another to perform the same work." *Mission Foods*, supra.

Accordingly, I find that the General Counsel has failed to sustain its burden to establish that Respondent unlawfully subcontracted bargaining unit work, as alleged in the complaint, and recommend that these allegations of the complaint be dismissed.

CONCLUSIONS OF LAW

1. Respondent is, and has been at all material times, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times since June 3, 2010, the Union has been the certified exclusive collective-bargaining representative, within the meaning of Section 9(a) of the Act, of an appropriate unit of employees, comprised of:

> All full-time, regular part-time and seasonal drivers, installers, driver-installers, helpers, installer-helpers, yard workers and carpenters employed by the Employer at its facility located at 939 Church Street, Baldwin, New York excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

4. By unilaterally laying off bargaining unit employees without timely notifying the Union and providing a meaningful opportunity to bargain over the decision to lay off employees and the effects of the layoffs, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

5. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Given the undisputed seasonal nature of the Employer's operations, a fact which is acknowledged in the certification of the bargaining unit, I asked counsel for the General Counsel to address the issue of what remedy the General Counsel would find appropriate for any violations found here. The General Counsel has taken the position that the employees at issue are entitled to a full make whole and backpay relief consistent with the Board's ruling in *Plastonics, Inc*., 312 NLRB 1045 (1993). ("The traditional and appropriate Board remedy for an unlawful unilateral layoff based on legitimate economic concerns includes requiring the payment of full backpay, plus interest, for the duration of the layoff.")[21] As the Board noted in that case, in situations involving unlawful unilateral changes, the normal remedy is to order restoration of the status quo ante as a means to ensure meaningful bargaining, and this policy has been approved by the Supreme Court. Id. (citing *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964)). See also

[20] I must emphasize that these assertions, made by witnesses called for the General Counsel, were not rebutted.

[21] Although counsel for the General Counsel did not specifically address this issue in his posthearing brief, *Plastonics* is cited in a separate exhibit identifying laid-off unit employees.

Lapeer Foundry & Machine, 289 NLRB 952, 955–956 (1988); *Wilen Mfg.*, 321 NLRB 1094, 1100 (1996) (and cases cited therein). Respondent has presented no specific contention regarding an appropriate remedy, other than to argue generally that the General Counsel's reliance upon *Plastonics* is misplaced due to its substantive defenses to the allegations of the complaint, which have been addressed above. Respondent also argued, at the hearing, that it would be unreasonable to require Respondent to compensate its laid-off employees for many months when there was no work available for them.

Based upon the above-cited authority, I find I am constrained to order the traditional make whole remedy for the unlawful unilateral layoffs here.

Accordingly, having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Respondent shall be ordered to provide notice to its employees' bargaining representative of layoffs undertaken for economic reasons, and upon request, to bargain over decisions to lay off employees, and to bargain over the effects of such layoffs. The Respondent, having unlawfully laid off bargaining unit employees for economic reasons without providing the Union timely notice and a opportunity to bargain about the decision to lay off employees and its effects, must offer those employees reinstatement and make them whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful conduct. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2011).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

ORDER

The Respondent, Rose Fence, Inc., Baldwin, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally laying off employees in the following bargaining unit represented by Local 553, International Brotherhood of Teamsters (the Union):

> All full-time, regular part-time and seasonal drivers, installers, driver-installers, helpers, installer-helpers, yard workers and carpenters employed by the Employer at its facility located at 939 Church Street, Baldwin, New York excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act

without providing the Union with timely notice and an opportunity to bargain about the decision to lay off employees and the effects of the layoff.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any layoff of bargaining unit employees notify and, on request, bargain with Local 553, International Brotherhood of Teamsters as the exclusive collective-bargaining representative of employees in the bargaining unit, over the decision to lay off employees and the effects of such layoff.

(b) Within 14 days from the date of the Board's Order, offer the employees unilaterally laid off after the Union's selection as collective-bargaining representative full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make whole the unit employees described above any loss of earnings and other benefits suffered as a result of Respondent's unilateral lay off of employees, in the manner set forth in the remedy section of the decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Baldwin facility copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 29 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 2010.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT lay off employees in the following bargaining unit represented by Local 553, International Brotherhood of Teamsters (the Union):

> All full-time, regular part-time and seasonal drivers, installers, driver-installers, helpers, installer-helpers, yard workers and carpenters employed by the Employer at its facility located at 939 Church Street, Baldwin, New York excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act

without providing the Union with timely notice and an opportunity to bargain about the decision to lay off employees and the effects of the layoff.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed to you by Section 7 of the Act.

WE WILL, before implementing any layoff of bargaining unit employees notify and, on request, bargain with the Union over the decision to lay off employees and the effects of such layoff.

WE WILL, within 14 days from the date of the Board's Order, offer our employees unlawfully laid off after the Union's selection as collective-bargaining representative full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole our unit employees who were unlawfully laid off for any loss of earnings and other benefits suffered as a result of our unilateral lay off of employees, less any interim earnings, plus interest.

ROSE FENCE, INC.